

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

ELIZABETH VAN DUYNE, and THE §
STATE OF TEXAS, §
Plaintiffs, §
v. § CIVIL ACTION NO. 4:22-cv-00122-O
§
CENTERS FOR DISEASE CONTROL §
AND PREVENTION, ROCHELLE P. §
WALENSKY, in her official capacity as §
Director of the CDC, SHERRI A. BERGER, §
in her official capacity as Chief of Staff of the §
CDC, UNITED STATES DEPARTMENT §
OF HEALTH AND HUMAN SERVICES, §
XAVIER BECERRA, in his official §
capacity as Secretary of HHS, and §
UNITED STATES OF AMERICA. §
Defendants. §

STATUS REPORT AND PROPOSED BRIEFING SCHEDULE

On February 16, 2022, the Court ordered the parties to meet and confer to prepare a status report that provides the Court with a proposed briefing schedule and a hearing date for Plaintiff Van Duyne’s Motion for Preliminary Injunction (ECF No. 3, the “Motion”). (ECF No. 6).

The parties have conferred, but have been unable to agree to a briefing schedule. The parties’ proposals are as follows:

- Plaintiffs Van Duyne and the State of Texas’s proposed briefing schedule would require a response to the motion for preliminary injunction, from Defendants, by February 28, a reply from Plaintiff by March 4, and set oral argument the week of March 7.¹

¹ The State of Texas did not join the motion for a preliminary injunction, but supports Plaintiff Van Duyne’s proposed briefing schedule and opposes Defendants’ proposal.

- Defendants' proposal would require a response by March 4, a reply from Plaintiff by March 9, and any oral argument at the Court's convenience, if necessary.

The parties also respectfully request that Defendants' obligation to answer or otherwise respond to the complaint be stayed pending the Court's resolution of Plaintiff's motion for a preliminary injunction.

Plaintiff Van Duyne's position

As argued in the Motion, the CDC's Mask Mandate² for transportation hubs and conveyance is unlawful. Because it is not enjoined, Plaintiff will face irreparable harm every time she travels by commercial air. The Court recognized this already by ordering the parties to meet and confer about a proposed briefing schedule, rather than rely on the deadlines in the local rules. Accordingly, expeditious briefing is in the interest of justice.

First, there will be no adequate legal remedy if Plaintiffs win this case on the merits. Plaintiff regularly travels by airplane due to her duties as a Congresswoman. In fact, she has nine flights booked between now and the end of March, and she will undoubtedly book more in the near future. Once she is forced to wear a mask on these flights against her choice, there will be no way to remedy that harm because money damages are not available.

Second, the Motion is not overly complicated. The Motion only raises two issues. The first issue is a straightforward statutory interpretation issue, where there is ample recent guidance from appellate courts (including the Supreme Court). The second issue challenges the CDC's interpretation under the nondelegation doctrine. Additionally, the motion presents a

² *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025 (Feb. 3, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-02-03/pdf/2021-02340.pdf>.

straightforward legal challenge without the need for discovery or any other kind of factual development.

Third, opposing counsel advises that they are currently litigating three other preliminary injunction motions involving this order, though those cases are factually distinct and based on medical exemptions. Therefore, Defendants are not unfamiliar with the legal landscape surrounding this order.

Additionally, though the Mask Mandate is about one year old and delay seeking an injunction “militates” against the need for preliminary relief, *Alvarez v. Tex. Educ. Agency*, 2020 U.S. Dist. LEXIS 231872, at *16 (W.D. Tex. Dec. 9, 2020), the guidance and regulations surrounding masking during interstate travel have been unpredictable. The Mask Mandate was only instituted almost a full year after COVID-19 was declared a nationwide emergency. See *CDC Museum Timeline* (2022) (noting nationwide emergency declared March 13, 2020), available at <https://www.cdc.gov/museum/timeline/covid19.html>.

The Transportation and Security Administration (the “TSA”) also has a parallel order that relies on the CDC’s Mask Mandate. See SD1542-21-01 available at <https://www.tsa.gov/sites/default/files/sd-1542-21-01.pdf>. The first TSA order was set to expire May 11, 2021, *id.*, but was recently renewed. See SD 1542-21-01C available at <https://www.tsa.gov/sites/default/files/sd-1542-21-01c.pdf>. The CDC also recently signaled it would not change its federal mask guidance. See Sheryl Gay Stolberg, “*We Are Not There Yet*”: *As States Drop Mask Rules, the C.D.C. Stands Firm*, The New York Times (Feb. 9, 2022) available at <https://www.nytimes.com/2022/02/09/health/mask-rules-cdc.html>. Given the unpredictable nature of the masking rules with the reasonable expectation that the Mask Mandate may soon end, any delay in filing suit by the Plaintiff was reasonable.

Defendants' Position

The Local Rules provide a defendant with twenty-one days to file a brief in response to a motion for a preliminary injunction. N.D. Tex. L.R. 7.1(e). Plaintiff offers no cogent reason to deviate from that default schedule, much less to decline Defendants' reasonable compromise—particularly given her extended delay in seeking relief. Although Plaintiff, a self-described “frequent flyer,” now asserts that the challenged CDC order causes her irreparable harm, she has apparently been wearing a mask on commercial flights for over a year. *See Decl. of Elizabeth Van Duyne*, ECF No. 3, ¶ 3 (plaintiff takes “at least 40 round trips per year”). That “demonstrat[es] that there is no apparent urgency to the request for injunctive relief,” and therefore no reason to brief it more quickly than the Local Rules require. *Gonannies, Inc. v. GoAuPair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) (quoting *Wireless Agents, L.L.C. v. T-Mobile USA, Inc.*, 2006 WL 1540587, *3 (N.D. Tex. June 6, 2006) (internal citations and punctuation omitted)).

Plaintiff acknowledges her delay in filing suit, but asserts that because “the guidance and regulations surrounding masking during interstate travel have been unpredictable,” she was justified in waiting until now to seek relief. But the only order challenged here has been in effect and unchanged for over a year. And Plaintiff is challenging not the rationality of that order, but the legal and constitutional authority of Defendants to issue it in the first place. On her theory, the order was unlawful from day one; the only difference between then and now is that Plaintiff would now choose not to wear a mask, if permitted. Van Duyne Decl. ¶ 6. This is not a sound basis for the Court to upend its established policies and procedures.

Although expedition is not warranted at all here, Defendants have proposed a reasonable compromise on scheduling that balances Plaintiff's desire to expedite proceedings with Defendants' need for a reasonable opportunity to address the motion in light of other competing

demands on the time of counsel for Defendants, including in six other cases challenging the same order.³ Each of these cases was filed prior to this one, and in four of them, the plaintiffs seek preliminary relief on the ground that—unlike Plaintiff—they are unable to wear a mask, and thus unable to fly, for medical reasons. Yet Plaintiff refused Defendants’ proposal, which would have given Defendants just four more days to oppose her motion. Instead, Plaintiff insists on an arbitrary timetable under which she will fly three times before the parties have fully briefed the motion. Van Duyne Decl. ¶ 4 (flights scheduled for February 26, February 28, March 3, March 7, March 10, March 15, March 18, March 23, and March 28). This belies the alleged gravity of Plaintiff’s situation underlying the parties’ scheduling disagreement.

Accordingly, Defendants respectfully ask the Court to enter their proposed briefing schedule on Plaintiff’s motion for a preliminary injunction.

Respectfully submitted,

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³ See *Wall v. CDC*, No. 6:21-cv-975 (M.D. Fla.); *Bobay-Somers v. HHS*, No. 1:21-cv-00335 (N.D. Ind.); *Health Freedom Def. Fund. v. Biden*, No. 8:21-cv-1693 (M.D. Fla.); *Andreadakis v. CDC*, 3:22-cv-00052 (E.D. Va.); *Faris v. CDC*, No. 3:22-cv-23 (W.D. Ky.); *Seklecki v. CDC*, No. 1:22-cv-10155 (D. Mass.).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on February 23, 2022, with the Clerk of the Court for the Northern District of Texas, and sent via email and/or certified mail, return receipt requested to the following:

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